

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

FILMED

JUN 03 1991

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 72498-G76L BY WAYNE CROSS)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 3, 1991, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 72498-76L is hereby granted to Wayne C. Cross to appropriate 450 gpm up to 124 acre-feet of groundwater per annum at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, Township 20 North, Range 24 West, Sanders County, for supplemental sprinkler irrigation on 80 acres in the S $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 14. The period of use shall be from April 15 to October 15, inclusive of each year. The means of diversion shall be a manifold system with one pump on a drilled well, 52 feet deep, which is connected to two other wells, 10 feet deep with a horizontal collector on

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each.

A. This Permit is supplemental to Water Right Nos. P000013-g76L and C072497-g76L. When combined to irrigate overlapping areas, the combined appropriation shall not exceed 450 gallons per minute up to 240 acre-feet per annum. Each Water Right is limited to the flow rate, volume, point of diversion, place of use, and beneficial use of that individual right.

B. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana law.


C. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon demand and no later than November 30 of each year to the Kalispell Water Resources Regional Office, 3220 Highway 93 South, P.O. Box 860, Kalispell, Montana, 59903-0860.

D. This Permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance to this Permit, do not create in the Permittee any equity or vested right against the Tribes. The Permittee is hereby notified that any financial outlay or work invested in a project pursuant to this Permit is at Permittee's risk.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of May, 1991.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21st day of May, 1991 as follows:

Wayne C. Cross
691 CR 382
Plains, MT 59859

Charles Morland Neiman
and Dorla Bee Neiman
121 Camas Creek Road
Plains, MT 59859

Camaroot Ranch Inc.
Sid Cross, President
Box 113
Perma, MT 59859

Richard Gebhardt
6296 Kruse Lane
Ronan, MT 59864

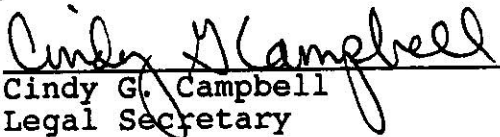
Clayton Matt
Confederated Salish and
Kootenai Tribes
P.O. Box 278
Pablo, MT 59855

U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

David L. Pengelly
Knight, MacLay & Masar
P.O. Box 8957
Missoula, MT 59807-8957

Chuck Brasen, Manager
Kalispell Water Resources
Regional Office
P.O. Box 860
Kalispell, MT 59903-0860

Mark Shapley, Hydrogeologist
Water Management Bureau
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Legal Secretary

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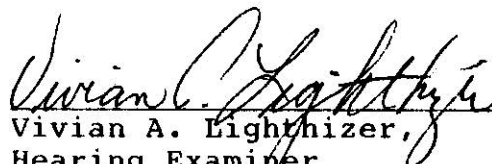
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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) NOTICE OF ERRATUM
NO. 72498-G76L BY WAYNE C. CROSS)

* * * * *

In the Proposal for Decision, the description of the Applicant's manifold system is incorrect. Please replace page 4 of the Proposal with the attached page.

Dated this 9th day of April, 1991.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Erratum was duly served upon all parties of record at their address or addresses this 9th day of April, 1991 as follows:

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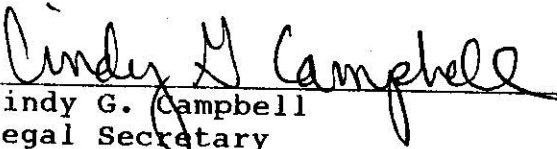
CASE # 72498

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Cindy G. Campbell
Legal Secretary

Section 14, Township 20 North, Range 24 West, Sanders County, for supplemental sprinkler irrigation on 80 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of said Section 14. The proposed period of use is from April 15 to October 15, inclusive of each year. The drilled well, 52 feet deep, would be connected to two other wells in a manifold system which would use one pump. The proposed flow rate would not be in addition to the existing flow rate; the combined flow rate would be 450 gpm. (Agreement between Wayne Cross, Mary Cross, and Camaroot Ranch, Inc.)

6. Applicant's manifold system consists of a cribbed well, 10 feet deep with a horizontal collector; a cased well, 10 feet deep; and the drilled well, 52 feet deep, with a horizontal collector. Both the cribbed well and the cased well are connected to the drilled well by pipes. A turbine pump will be installed on the drilled well which will pull water from the drilled well while the water from the other wells runs into the drilled well by gravity flow. The water then is pumped through a pipeline to two wheel line sprinklers. (Department file and testimony of Applicant.)

7. Permit No. 00013-g76L was issued to Herbert Cross to appropriate 450 gpm up to 120 acre-feet of water per annum for irrigation purposes. The means of diversion for this Permit is the cribbed well. Certificate No. 72497-g76L was issued to Wayne C. Cross to appropriate 75 gpm up to 60.65 acre-feet of water per annum for irrigation purposes. The means of diversion for this Certificate is the drilled well, 52 feet deep. The instant

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* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 72498-G76L BY WAYNE C. CROSS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was convened in the above-entitled matter on December 5, 1990, continued and reconvened on March 7, 1991, in Plains, Montana.

Applicant Wayne Cross appeared at the hearing in person and by and through counsel, David Pengelly.

Mary D. Cross, co-owner of the proposed project site, appeared at the hearing.

Objector Camaroot Ranch, Inc. appeared by and through Sid Cross and counsel, Richard Gebhardt.

Objector Charles Morland Neiman appeared in person and by and through his son, Dale Neiman.

Objector Dorla Bee Neiman appeared by and through her son, Dale Neiman.

Mark Shapley, Hydrogeologist with the Department of Natural Resources and Conservation (Department), appeared at the hearing as a staff expert witness.

Charles Brasen, Regional Manager of the Department's Kalispell Water Resources Regional Office appeared at the hearing.

CASE # 72498

PRELIMINARY MATTERS

The hearing in this matter was convened on December 5, 1990, in Thompson Falls, Montana. After Mark Shapley gave his testimony, the parties moved for continuance pending negotiations. A continuance was granted without date and the parties were to notify the Hearing Examiner no later than February 15, 1991, of results of the negotiations. On February 4, 1991, the Hearing Examiner was notified that the parties were unable to reach an agreement. The hearing was then reconvened on March 7, 1991.

The Applicant and Objector Camaroot Ranch, Inc. reached an agreement, leaving only the objection of the Neimans.

EXHIBITS

The Applicant offered the only exhibit, a copy of part of a USGS map which has been enhanced to show the Applicant's proposed places of use and point of diversion. The exhibit was accepted into the record without objection.

The Department file was made available to all parties who had no objection to any part of it, therefore the Department file is entered into the record in its entirety.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) or 85-2-306, a person may not appropriate water or commence construction of diversion,

impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Wayne C. Cross filed the above-entitled Application with the Department on August 25, 1989.

3. Pertinent portions of the Application were published in The Plainsman on December 7, 1989.

4. Mary D. Cross, Herbert F. Cross and Applicant have formed a legal partnership. Applicant manages the properties owned by Mary D. and Herbert F. Cross. Applicant has written permission to apply for water rights in his name. (Department file and testimony of Applicant and Mary Cross.)

5. Applicant originally proposed to appropriate groundwater at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, Township 20 North, Range 24 West, Sanders County, by means of a groundwater well. The water would have been pumped at a rate of 550 gallons per minute (gpm) up to 345 acre-feet per annum for supplemental irrigation on 80 acres in the S $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 14, 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23, Township 20 North, Range 24 West, and for new irrigation on 40 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 23. The proposed period of use was from April 15 to October 15, inclusive of each year. The drilled well, 52 feet deep, would have been connected to two other wells in a manifold system which would use one pump.

After the agreement between Camaroot Ranch, Inc. and Applicant, the proposal was changed to appropriate 450 gpm up to 124 acre-feet of water per annum at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of

Section 14, Township 20 North, Range 24 West, Sanders County, for supplemental sprinkler irrigation on 80 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of said Section 14. The proposed period of use is from April 15 to October 15, inclusive of each year. The drilled well, 52 feet deep, would be connected to two other wells in a manifold system which would use one pump. The proposed flow rate would not be in addition to the existing flow rate; the combined flow rate would be 450 gpm. (Agreement between Wayne Cross, Mary Cross, and Camaroot Ranch, Inc.)

6. Applicant's manifold system consists of a cribbed well, 10 feet deep; a cased well, 10 feet deep; two horizontal collectors, (one each on the shallow wells) and the drilled well which is 52 feet deep. Both the cribbed well and the cased well are connected to the drilled well by pipes. A turbine pump will be installed on the drilled well which will pull water from the drilled well while the water from the other wells runs into the drilled well by gravity flow. The water then is pumped through a pipeline to two wheel line sprinklers. (Department file and testimony of Applicant.)

7. Permit No. 00013-g76L was issued to Herbert Cross to appropriate 450 gpm up to 120 acre-feet of water per annum for irrigation purposes. The means of diversion for this Permit is the cribbed well. Certificate No. 72497-g76L was issued to Wayne C. Cross to appropriate 75 gpm up to 60.65 acre-feet of water per annum for irrigation purposes. The means of diversion for this Certificate is the drilled well, 52 feet deep. The instant

Application will supplement these water rights and will bring the shallow cased well and its horizontal collector into compliance with the Water Use Act. All the diversions are located in the NW¼SW¼SE¼ of Section 14, Township 20 North, Range 24 West. (Applicant's Exhibit 1, testimony of Applicant, and Department file.)

8. An aquifer test was performed by Mark Shapley during the period of October 11 through October 14 of 1990, in the Camas Prairie Basin in the area of the proposed diversion. As a result of this test, Mr. Shapley concluded there is more water to appropriate, however, the water levels in the aquifer would probably decline thus affecting some of the shallower wells¹ and developed springs.

He further states that groundwater flowing beneath the thin lacustrine clay unit of the central basin becomes confined, developing as much as 12 to 15 feet of pressure head at lower land surface elevations. The thinness of the confining clays results in a somewhat unusual situation where shallow dug wells or other excavations may flow at the surface and shallow pumping wells may interfere with each other over considerable distances.

Mr. Shapley also determined that increased irrigation withdrawals will have two basic qualitative effects. One is a decrease in other discharges from the basin. The additional

¹Shallow wells as used in this Proposal are wells that penetrate only the top of the aquifer, leaving a large portion of the aquifer untapped.

water pumped under Applicant's requested Permit, less whatever small fraction may re-enter the aquifer, may cause decreased outflow through Lower Camas Creek and diminished evapotranspiration by plants. The other result of additional withdrawals will be a lower average water elevation in the vicinity of the wells. The advantage of the Applicant's collector system comes in distributing drawdown over a much larger area. (Department file and testimony of Mark Shapley.)

9. Objectors Neiman possess a portion of the water right claimed in Statement of Claim No. W142364-76L for stock water use at a flow rate of 10 gpm up to 1.25 acre-feet per year from a developed spring in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 23, Township 20 North, Range 24 West. The developed spring has, in the past, flowed year round, but in recent years has flowed only in the spring of the year. Later in the summer, Neimans have resorted to pumping from the spring. Neimans' objection to the instant Application is that the proposed appropriation may affect the developed spring. The developed spring is located approximately one-quarter of a mile from Applicant's proposed system. Neimans believe they have the right to keep the spring flowing instead of having to use a pump. Noting the decline in the water levels, Neimans also have a fear, that at some time, they may not be able to exercise their water right even by pumping. (Department file and testimony of Dale Neiman.)

10. Neimans' developed spring is an excavation which creates a pond with a corrugated pipe set in the gravels. Water

flows from the pipe into the pond which also flows. (Testimony of Dale Neiman.)

11. The proposed point of diversion and place of use are within the boundaries of the Flathead Indian Reservation. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation and the Bureau of Indian Affairs chose not to attend the hearing in this matter, however, each responded to the Notice of Hearing stating they continue their objection. The objections of both parties were on grounds of lack of jurisdiction. (Department file.)

12. According to the record there are no other planned uses or developments in the area of the Application for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Facts and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Title 85, Chapter 2, Part 3, MCA.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial evidence that the following criteria set forth in § 85-2-311(1), MCA, are met.

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5, 6 and 7.

6. The Applicant has possessory interest in the proposed place of use. See Finding of Fact 4.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been

issued or for which water has been reserved. See Finding of Fact 12.

8. There are unappropriated waters in the source of supply at the point of diversion, at times when the Applicant proposes to put those waters to beneficial use. The water is available in the amount requested throughout the proposed period of use. See Finding of Fact 8.

It is clear from the record that the concern is not over the availability of water, but rather over artesian pressure and shallow well interference. See Findings of Fact 9 and 10.

9. There is substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 8, 9, and 10.

Prior appropriators may be affected; however, although artesian flow and shallow wells are reasonable means of diversion, they are not protectable. Section 85-2-401(1) clearly states priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of the water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise his water right under the changed conditions.

To hold that an appropriator is entitled to maintain shallow wells and artesian pressure against any subsequent appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their

own means of diversion easier. Both case law and statutes prevent such a result.

At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. Schodde v. Twin Falls Land & Co., 224 U.S. 107, 92 S. Ct. 470, 56 L.Ed 686. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the senior's lawful demand.

Colorado Springs v. Bender, 148 Colo. 458, 366 P. 2d 552 (1961) at 555. See also Alamosa-La Jara v. Gould, 674 P 2d 914 (1983); In re Application No. 31441-g41R by McAllister; In re Application No. 71133-g41B by Hildreth; In re Application No. 42666-g41F by MacMillan.

The principle that no appropriator should be allowed to "command the source" simply so that he may have a convenient method of diversion, is consistent with the State of Montana's policy of maximizing the beneficial use of water. See § 85-2-101(3).

Objectors Neiman testified they have in the past, diverted water from their developed spring with a pump when it stops flowing, thus indicating they can reasonably exercise their water right under changed conditions. See Finding of Fact 9. In the

unlikely event they could no longer exercise their water right by pumping, Neimans would then be able to "call" the source, i.e., notify junior appropriators they must cease pumping until Neimans are able once again to exercise their senior water right.

10. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation hold an unquantified reserved water right. Any Permit issued for water on the Reservation by the Department is junior to the Tribes' water rights.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 72498-76L is hereby granted to Wayne C. Cross to appropriate 450 gpm up to 124 acre-feet of groundwater per annum at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, Township 20 North, Range 24 West, Sanders County, for supplemental sprinkler irrigation on 80 acres in the S $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 14. The period of use shall be from April 15 to October 15, inclusive of each year. The means of diversion shall be a manifold system with one pump on a drilled well, 52 feet deep, which is connected to two other wells, 10 feet deep with a horizontal collector on each.

A. This Permit is supplemental to Water Right Nos. P000013-g76L and C072497-g76L. When combined to irrigate overlapping areas, the combined appropriation shall not exceed 450 gallons

per minute up to 240 acre-feet per annum. Each Water Right is limited to the flow rate, volume, point of diversion, place of use, and beneficial use of that individual right.

B. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana law.

C. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records upon demand and no later than November 30 of each year to the Kalispell Water Resources Regional Office, 3220 Highway 93 South, P.O. Box 860, Kalispell, Montana, 59903-0860.

D. This Permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance to this Permit, do not create in the Permittee any equity or vested right against the Tribes. The Permittee is hereby notified that any financial outlay or work invested in a project pursuant to this Permit is at Permittee's risk.

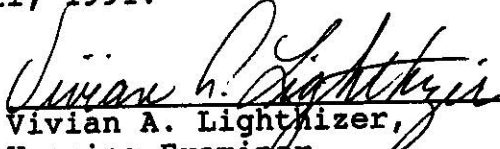
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must

be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 3rd day of April, 1991.


Vivian A. Lightizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

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